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LAW AND THE SCIENCE OF LAW IN RECENT THEORIES*

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"*Rechtswissenschaft*," says Kantorowicz, "*ist Wortwissenschaft*." Much of the discussion as to the "nature of law" which raged in the last century, and much which goes on today, seems to justify this gibe.

For many reasons, "law" does not admit of the sort of definition which was attempted. In what is perhaps its oldest meaning in the modern world it refers to the body of authoritative precepts by which tribunals are to be guided in the determination of controversies, and hence those by which individuals are to be guided in their conduct. But even this is a composite. For one thing, some of the precepts are enacted and some are traditional, and it matters much which are taken as the type.¹ For another, the body of authoritative materials for the guidance of tribunals includes more than precepts. A received traditional technique and a number of received ideals are also to be considered;² and along with rules, prescribing definite, detailed consequences for definite detailed states of fact, there are principles, conceptions, and standards,³ and in another direction doctrines and systematic ideas, and in another direction institutions, to be considered. Moreover, much depends on the standpoint from which the body of precepts, if one limits himself to these, is ap-

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1. I discussed this matter at some length in a paper, *Theories of Law* (1912) 22 YALE L. J. 114.

2. I have discussed this in a number of papers: *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 641, 643-653; *The Ideal Element in American Judicial Decision* (1931) 45 HARV. L. REV. 136; *A Comparison of Ideals of Law* (1933) 47 HARV. L. REV. 1.

3. This, too, I have considered at length elsewhere: *Juristic Science and Law* (1918) 31 HARV. L. REV. 1047, 1060 *et seq.*; *The Administrative Application of Legal Standards* (1919) 44 A. B. A. REP. 445, 454-458; *Hierarchy of Sources and Forms in Different Systems of Law* (1933) 7 TULANE L. REV. 475, 481-486.

proached.⁴ From the standpoint of the judge we may think of rules of decision. From the standpoint of the individual we may think of rules of conduct or of threats of consequences of conduct. From the standpoint of the counsellor at law they seem rather to be the basis of prophecies or predictions of judicial and administrative action. From the standpoint of the jurist, they might seem a body of raw materials for systematic organization or for the development of doctrine.

But "law" has been used not only for the body of legal precepts or, in a wider sense, for the whole body of authoritative materials in which are to be found the grounds of judicial and administrative action, but also for the legal order,⁵ and in addition, recently, for the judicial process.⁶ Analytical jurisprudence uses "law" in the first of these three senses. It thinks of the rule element of law used in that sense. It thinks of rules of law either as rules of conduct or as rules of decision. Historical and philosophical jurists in the last century, however, by no means acquiesced in this limitation of the meaning of "law"; and in recent times new meanings have been attached to the term with the rise of new schools of jurists.

John Dewey has noted that in philosophy generally today we are so "largely occupied with merely technical and formal questions that we are threatened with a new kind of scholasticism that lacks the vitality of classic scholasticism."⁷ The revival of analytical jurisprudence since the World War, the belated recognition of Austin on the Continent since the second decade of the present century,⁸ and the recent development of analytical theories on bases of social-philosophical jurisprudence, suggest a like tendency in the science of law.

Following Bentham,⁹ the English analytical jurists assumed that "law" was an aggregate of "laws." It followed that by analyzing and defining "a law" they could arrive at an understanding of "law." From that standpoint "law" was a body of legal precepts and the task of a science

4. See my paper *Hierarchy of Sources and Forms in Different Systems of Law*, *supra* note 3, at 479-481.

5. KANT, *METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE* (1797) 27; KRAUSE, *ABRISS DES SYSTEMES DER PHILOSOPHIE DES RECHTES* (1828) 209; GAREIS, *ENZYKLOPÄDIE DER RECHTSWISSENSCHAFT* (1887) § 5; 3 BEROLZHEIMER, *SYSTEM DER RECHTS- UND WIRTSCHAFTSPHILOSOPHIE* (1906) § 17.

6. E.g., FRANK, *LAW AND THE MODERN MIND* (1930) 274n.

7. Review of Report of the President's Research Commission on Social Trends (1933) 43 *INT. J. OF ETHICS* 339, 345.

8. SOMLÓ, *JURISTISCHE GRUNDLEGERE* (1917); LÉVY-ULLMANN, *LA DÉFINITION DU DROIT* (1917); ROGUIN, *LA SCIENCE JURIDIQUE PURE* (1923); Kelsen, *DAS PROBLEM DER SOUVERÄNITÄT* (1920). See POUND, *The Progress of the Law—Analytical Jurisprudence, 1914-1927* (1927) 41 *HARV. L. REV.* 174.

9. *PRINCIPLES OF MORALS AND LEGISLATION* (1879 ed.) 324.

of law was to distinguish those precepts from others superficially analogous. When they had done this and had excluded everything but legal precepts or "laws" properly so-called, they felt that they had arrived at the "pure fact of law," as they called it,¹⁰ that they had determined "the province of jurisprudence,"¹¹ and that they were on a solid footing of reality.¹² The historical jurists, starting with primitive where the analytical jurists started with developed systems, could find there no differentiated social control. Law in the sense of a body of laws, morals, ethical custom, customary courses of decision, customary modes of conducting transactions, and even religious rites were found making up an undifferentiated body of precepts of social control. So they assumed that all social control was "law."¹³ They thought of the legal order, one phase or side of social control, as the immediate province of jurisprudence, and concerned themselves with the basis of the authority, the nature of the sanctions and the mode of evolution of the legal order in the societies of western Europe and of its characteristic institutions. How completely analytical jurist and historical jurist were talking of different things while discussing the nature of "law," thought of as one thing, is brought out when we compare Austin's theory of sanction¹⁴ with Maine's.¹⁵ Austin is talking of that which makes particular legal precepts effective in action. Maine is talking about the basis of the effectiveness of the legal order as a whole. Yet each speaks of the sanction of "law."

Philosophical jurists likewise took part in the discussion. What interested them was neither the aggregate of "laws" nor a specialized régime of social control. They were looking at and talking about a body of received ideals of what social control was for, of the end of social and legal institutions, and of what legal precepts should be in the light thereof.¹⁶ These ideals seemed to them enduring realities of which legal precepts or régimes of social control or legal orders of the time and place were but imperfect realizations or fumbling formulations. They were talking of a very real thing when they discussed such ideals. But they labeled this real thing "law," as the analytical jurists had labeled the aggregate of legal precepts "law," and as the historical jurists had affixed the same label to all social control. Laws were made or established by

10. AMOS, *SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE* (1872) 18.

11. 1 AUSTIN, *JURISPRUDENCE* (3d ed. 1869) 82.

12. MARKBY, *ELEMENTS OF LAW* (4th ed. 1889) § 12.

13. 1 VINOGRADOFF, *HISTORICAL JURISPRUDENCE* (1920) 119.

14. 1 AUSTIN, *op. cit. supra* note 11, at 94.

15. MAINE, *INTERNATIONAL LAW* (1888) 50-52.

16. E.g., "The expression of the idea of right involved in the relation of two or more human beings." MILLER, *PHILOSOPHY OF LAW* (1884) 9.

determinate lawmakers. Social control developed; it was not made to order at one stroke. The ideal element in the body of laws, the received ideals which give direction to social control, were not made, they were discovered. The controversy whether "law" was made, or grew, or was discovered came to little more than a question of which of three things was entitled to the label "law." There were at least three things. There was but one label.

With the rise of psychology in the present century, another thing has claimed attention and those who have their eyes upon it have been striving to claim for it the same label. As what Mr. Justice Cardozo has happily called the judicial process, to which we must soon be adding what might be called the administrative process, comes to be studied, those who have come to be aware of its significance and of the problems which it raises soon claim for it the label "law." They argue that everything that enters into or affects the judicial process is "law," or that the whole process, both judicial and administrative—everything "which officials do" about disputes,—is "law" and that every factor which affects what such officials do must be taken account of in a theory of law.¹⁷

It would seem, therefore, that what is needed is more labels, not more discussion as to title to the older one. But in truth we have labels enough. We can speak of the body or system of laws, of the legal order, of the body of received ideals, and of the judicial process. And if we could induce the participants to adopt these labels, the controversy would still go on. For behind the attempts to appropriate the term "law" for some one of four distinct things, is a controversy as to the relative significance of the several things and as to the province and scope of jurisprudence. How far does each or do all of these things come within the province of the jurist? If his province is said to be the science of "law," then the advocates of each of the four will claim for it the name of "law" and will vouch for their claims arguments as to the "nature of law." When we show that the term "law" is used in more than one sense we have not shown that the discussions as to the nature of "law" are futile. We have only shown that they have in form been misdirected.

Perhaps some consciousness of this is reflected in the boast of every type of jurist that he is dealing with reality while those who would apply the label "law" in a different way are dealing with illusion. We have seen that the analytical jurist saw in the positive legal precepts of each particular jurisdiction the "pure fact of law." The historical jurist saw in legislative imperatives mere illusion. There was no life except in the

17. FRANK, *loc. cit. supra* note 6; LLEWELLYN, *THE BRAMBLE BUSH* (1930) 3.

principles of human or of social action revealed by experience and formulated in a continuous historical development. The philosophical jurist thought of legislation and empirical formulations alike as crude gropings for ideals which alone had significance. The positivist told us that he alone had grasped reality by means of observation verified by further observation. The economic realist asserted that precepts and principles and ideals and positivist observations through the spectacles of jurists and lawyers were equally illusory and that reality was to be found in the self-interest of the dominant social class of the time and place, imposing its will upon those who are weaker by a skillful camouflage of rules and principles and ideals and positivist observations.¹⁸ When the realist of the moment tells us that he is a realist because he has found reality in the emotive experience or psychological make-up of particular judges or officials for the time being, he is but conforming to the settled tradition of jurisprudence for the past two centuries.

What we need to see in all this controversy, is that each group has its eye on something significant—more significant it may be at some times and in some places than others, but of enduring significance for the business of the jurist. Legal precepts have demonstrated their significance through experience of administration of justice by means of them in all lands and in all ages. When organized bodies of legal precepts, such as the modern Roman law, are found going round the world and guiding tribunals in the most diverse countries and among the most diverse races and holding their ground for centuries, there can be no touch with reality in a realism which denies their significance. Yet one need not, because he concedes their significance, confine the province of jurisprudence to systematizing and harmonizing them. The legal order is no less significant, and its historical continuity has been vindicated over and again against attempts at creative lawmaking out of whole cloth. A body of received ideals of the legal order, and of the ends of social control and of what legal precepts and their application should be, is one of the decisive factors not only in lawmaking and in juristic thinking, but in the process of judicial decision and administrative determination. The positivists had their finger on something of no mean significance when they insisted on the relation of legal to social phenomena as one phase of the latter to which, therefore, their science of society was applicable. The economic realists, if they carried it too far, none the less pointed out a factor of much influence in shaping and giving content to the imperative element in a body of legal precepts. And the psychological realists, as one might style them for the purposes of the moment, call our attention

18. Brooks Adams in *CENTRALIZATION AND THE LAW* (1906) 23, 31-35, 63-64, 132-133.

to factors in the judicial and administrative processes to which we must not close our eyes, which it behooves us to study in their operation and effect, and which, I suppose, even the most rigorous analytical jurist did not deny but merely relegated to the field of politics.

We need to see also how these different limitations of the province of jurisprudence and affixings of the label "law" to this or that depend on the social, political and legal problems of times and places and result from putting universally what are usually good working hypotheses for those times and places. English analytical jurisprudence puts universally the working formulas of the legislative reform movement of the nineteenth century. German historical jurisprudence puts universally the working creed of the reaction from the paper constitution-making and rationalist lawmaking of the French Revolution. Nineteenth-century metaphysical jurisprudence formulated universally the ideals of the era of competitive acquisitive self-assertion on the part of economically self-sufficient units in western Europe and America of that time. Positivism sought to formulate universally the rising demands of what may be called the socialization of law, using law in all three senses. The economic realists formulated universally interpretations of the transition from the competitive economic order to some order we have yet to understand and christen. The American realists of the moment, as I venture to think, put universally a theory of the judicial process as it goes on in the United States today, in a time of transition, when ideals are in flux and there is little to guide the application of standards, while there is a constantly increasing number of standards to apply.

All of these things, I have long contended, are within the province of jurisprudence. We need not call them all "law." Indeed, to do so invites confusion with no compensating advantages. The organized body of knowledge which has to do with a specialized phase or part of social control, namely, that part or phase which is carried on by politically organized society through the systematic application of the force of its organization to secure interests or desires or demands of human beings, is not to be limited by definitions of any traditional monosyllable.

In contemporary juristic thought, if we look the world over, the significant names are those of Jhering, Stammler, Gény, Duguit and Kelsen. Jhering¹⁹ turned our attention from the nature of law (meaning by "law" in this connection the legal order) to its end or purpose. He attacked the prevailing jurisprudence of conceptions and called for a jurisprudence of realities. Legal doctrines and legal conceptions, he said, were to grow out of life, instead of forcing life into legal doctrines and conceptions.

19. DER ZWECK IM RECHT (1877-1883); SCHERZ UND ERNST IN DER JURISPRUDENZ (1884).

Thus he turned attention also to the administrative element, the element of adjustment to unique situations, in the application of legal precepts to life or as we should say in America today, in the judicial process. Jhering died in 1892, and his last significant work was done in 1884. But his influence on jurisprudence has grown continually in the present century. Social utilitarians, positivists, and realists draw upon him continually. Indeed, juristic skepticism has brought forth little that cannot be found well put in his pages. Since Jhering, every jurist has been more or less a realist in the American sense.²⁰

Stammler²¹ has had the widest following on the Continent and now claims the greatest number of disciples of any jurist of the time. To my mind, his enduring contributions are in the legal rather than the philosophical parts of his writings. If his Kantian philosophy does not appeal to the present generation in the English-speaking world, his insistence on the relation of morals and ethics to the administration of justice through legal precepts, his theory of the social ideal as the criterion of justice through precepts, his insistence on the just decision of causes instead of merely on just rules, and his quest for a measure of values as a basis for application of legal precepts, bear upon the crucial problems of jurisprudence today and will require jurists to go back to him as we have been going back to Jhering.²²

Gény,²³ too, has been busied with the fundamental problem of values. But what is more important for us here and now, he has called our attention to the technique element in law (using law in the sense of the authoritative materials of judicial and administrative determination) and to the non-mechanical and administrative element in application of legal precepts and in adjudication, and has sought to put it in the order of reason.

Duguit²⁴ likewise worked on the problem of values, but his significant

20. Note the influence of Jhering in BENTLEY, *THE PROCESS OF GOVERNMENT* (1908).

21. *WIRTSCHAFT UND RECHT* (1896); *LEHRE VON DEM RICHTIGEN RECHTE* (1902, new ed. 1926); *THEORIE DER RECHTSWISSENSCHAFT* (1911); *LEHRBUCH DER RECHTSPHILOSOPHIE* (1922, 2d ed. 1923). There is a very good discussion of Stammler by Ginsburg in *MODERN THEORIES OF LAW* (1933) 38-51. See also BINDER, *PHILOSOPHIE DES RECHTS* (1925).

22. The school of Neo-Hegelians, followers of Josef Kohler, which was very active in the first two decades of this century, seems to have no important representatives at present. But I suspect that presently Kohler will be reckoned as one of the outstanding juristic thinkers of the century.

23. *MÉTHODE D'INTERPRÉTATION EN DROIT PRIVÉ POSITIF* (1899, 2d ed. 1919); 1 *SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF* (1913); 2 *id.* (1915); 3 *id.* (1921); 4 *id.* (1924). There is a good discussion of Gény by Wortley, in *MODERN THEORIES OF LAW* (1933) 139-159.

24. *L'ÉTAT, LE DROIT OBJECTIF, ET LA LOI POSITIF* (1901); *LE DROIT SOCIAL, LE DROIT INDIVIDUEL ET LA TRANSFORMATION DE L'ÉTAT* (2d ed. 1911); *LES TRANSFORMATIONS*

contribution has been to further the conception of the legal order as a part and phase of social control and the bringing to bear upon legal problems of the whole apparatus of the social sciences.

Kelsen,²⁵ now that Stammler has retired, is unquestionably the leading jurist of the time. His disciples are devoted and full of enthusiasm in every land. His ideas are discussed in all languages. His followers are probably the most active group in contemporary jurisprudence. In philosophy of law he is a Neo-Kantian and builds on Stammler.²⁶ But the critical side of his work is not of so much interest for us as the analytical. Three of his ideas are having wide influence: (1) The idea of jurisprudence as a normative science,²⁷ that is, one having to do with what ought to be in contrast with the natural sciences which have to do with what is, and hence depend upon observation and experiment; (2) the idea of a body of laws resting upon some ultimate and legally unchallengeable norm—in most modern states a written constitution, which takes the place, in his theory, of Austin's sovereign; and (3) the idea of the unity of the legal order.

As to the first, it will be seen that he thus answers much of what has been written of late as to how far there is or may be a science of law. His answer is that of St. Thomas Aquinas—*distinguo*. Analytical juris-

GÉNÉRALES DU DROIT PRIVÉ (1912); *Law and the State* (transl. by DeSloovere) (1917) 31 HARV. L. REV. 1-185. More attention has been paid to Duguit's political than to his juristic theory.

25. HAUPTPROBLEME DER STAATSRICHTSLEHRE (1911); DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRICHTS (1920, 2d ed. 1928); DER SOZIOLOGISCHE UND JURISTISCHE STAATSBEGRIFF (1st ed. 1922, 2d ed. 1928); ALLGEMEINE STAATSRICHTSLEHRE (1925). There is an excellent exposition and discussion of Kelsen by Lauterpacht, in MODERN THEORIES OF LAW (1933) 105-138. See also Voegelin, *Kelsen's Pure Theory of Law* (1927) 42 POL. SCI. Q. 268.

26. From the standpoint of philosophy of law, Kelsen's doctrine might be termed normative logicism. He seeks by formal logic to find conceptions which are to yield pure norms. Stammler's might be called an a-priorist logicism. He seeks generally valid presuppositions by a universal logical method. As to the philosophical side of Kelsen's work, in addition to his writings above referred to, see SANDER, STAAT UND RECHT (1922); RECHTSDOGMATIK ODER THEORIE DER RECHTSERFÄHRUNG (1921); KELSEN'S RECHTSLERE (1923); DIE TRANSZENDENTALE METHODE DER RECHTSPHILOSOPHIE UND DER BEGRIFF DES RECHTSVERFAHRENS (1920); PROLEGOMENA ZU EINER THEORIE DER RECHTSERFÄHRUNG (1922); ZUR METHODIK DER RECHTSWISSENSCHAFT (1923).

27. This theory of law as made up not of rules of what must be but of authoritative patterns of what ought to be—of what decisions ought to be and of what conduct ought to be—serves well to reconcile the results of looking at laws from different standpoints. The norms may be looked on as guides to conduct, as guides to decision, as threats of legal consequences, or as grounds of prediction of official action. As authoritative patterns, they can function in any of these ways. The norm theory begins with 1 BINDING, DIE NORMEN UND IHRE UEBERTRETUNG, (1872, 2d ed. 1890).

prudence eliminated all consideration of what ought to be and set up a "formal science"²⁸ on the basis of a postulated "pure fact of law." Recent realists have urged that as the phenomena of the judicial process do not always or necessarily conform to the rules of law, in which the analytical jurists found the materials on which to work with their formal science, it follows that there is no science of law, nor can there be one until a new set of materials is subjected to a new type of procedure. But what legal precepts ought to be, what decisions ought to be, what the judicial process in its details ought to be, are questions that have never wholly disappeared from our books, and have proved to be inseparably bound up in the question of what is, in which positivists and more recently realists have been seeking the basis of a real science. Here, again, the dispute is largely about words.

As a result of the second idea, Kelsen holds that we need not seek to bring law into accord with life. The norms are not to grow out of life, but life is to be adjusted to the norms. Compare Krause's formula which puts as the end of law the "life measured by reason." There is much in this in one sense. But in truth he and Jhering are talking of different things.

In the third he is explaining, in a way contrasting with treatment of the same problem from the standpoint of natural law, a matter much discussed in the Continental books.

In the judicial process the judge may at times and often does go outside of the body of authoritative legal materials for the guidance of decision. For example, the Austrian Civil Code provides that if the code leaves a question of law doubtful, "it must be decided in accordance with natural principles of right and law." The Italian Civil Code has a like provision. The Swiss Civil Code provides that in such cases the judge is to "pronounce in accordance with the rules which he would establish if he were to legislate." A similar situation in our law, where a court, for default of an applicable rule, turns to some precept of morals and applies it, has been discussed by analytical jurists since Austin. They had been in the habit of saying (using law in the sense of an aggregate of laws) that the first decision here was without law but under our Anglo-American doctrine of precedent might establish a law. Kelsen, using law in the sense of the legal order, says that it is within the law where the judge, as in case of the code provisions above, is referred by a law to the materials which he uses or is commanded to resort to them. In other words, the extra-legal materials, in the English analytical sense, may yet be made part of the law or brought into the law (in the sense

28. HOLLAND, *ELEMENTS OF JURISPRUDENCE* (1880) 11, (13th ed. 1924) 13. See JENKS, *THE NEW JURISPRUDENCE* (1933) 138-141.

of the legal order) by reference. This would serve also to fit permissible or prescribed discretion and a prescribed or permitted administrative element into the analytical theory.

So far as it shows that such things may be a proper and normal part of the legal order, that is, that all the operations of the judicial process do not need to take place in accordance with the exact prescribings of texts of a body of laws in order to be normal features of a legal order, Kelsen's point is well taken. But suppose instead of finding the basis of his decision in the materials to which the rule in the code refers him, an Austrian judge ignores the provision and shakes dice or gives effect to his personal prejudice against one of the parties? Here we have an operation of the judicial process. If such things happen at all frequently, the jurist must look into them and ask how and why they take place. But unless we use "law" in a new sense to cover all the operations of judges, without regard to the materials prescribed for their guidance, we can hardly say they take place according to law, much less that they are law. Nor would Kelsen go so far. What he insists on is that the utilizing of materials outside of the codes, to which the judge is referred by a rule of law, is not an extra-legal process.

Looking back at the work of these five significant jurists, do we find anything in common? For one thing, they all put the problem of values, of a criterion for valuing interests or claims or desires, in the first place as the fundamental problem of jurisprudence. Secondly, they look at the legal order and the body of legal precepts and the judicial process functionally. They ask how these work toward the ends disclosed by their measure of values. This leads them to appreciate the administrative element in the judicial process, to make provision in their theories for an individualized application of legal precepts, and to take account of the need of just and reasonable solutions of concrete cases, where the juristic thought of the past asked only if the rules applied were in themselves, and abstractly, reasonable and just. Thirdly, in one way or another, they think of law in relation to the whole process of social control. Finally, they think of "law" as something much more complex than was dreamed of in the last century and of the province of jurisprudence as much more inclusive.

Reviewing the juristic thought of the nineteenth century, we see that from the most diverse starting points and with the most diverse methods, jurists came to substantially the same result on the crucial problems of the legal order and the judicial process. Today, also, as we look at the different types of social-philosophical and sociological jurists we see a general movement in all of them in the same direction. In increasing measure we may perceive the same objectives and the same approach to them in all parts of the world.

In the United States we are more concerned with the judicial process than are jurists elsewhere, and that concern makes our juristic left wing seem more radical than the juristic left wing elsewhere. Professor Goodhart of Oxford in a recent book of lectures by British jurists on contemporary theories of law has psychoanalyzed the American realists, and has suggested a psychological explanation of their doctrines.²⁹ But it seems to me more worth while to note how their emphasis on certain phenomena of the judicial process is connected with contemporary features of the legal order in the United States.

We must remember that certain problems of the judicial process which seem practically negligible elsewhere, have become acute with us. We have no unified source of lawmaking, either legislative or judicial. In any particular jurisdiction the great mass of our output of judicial decision has only persuasive authority. Forty-nine lawmaking bodies and sixty high appellate tribunals have power to declare the law by establishing precedents binding within their jurisdiction and persuasive without. From the first it has been part of our judicial tradition, and it was once a necessary part, to try every legal precept, at the crisis of application, with respect to its applicability, that is, its measuring up to judicial ideals. This unstable tendency has been aggravated by short tenure of judicial office and subjection of judges to politics in a majority of the states. It has been aggravated by the growth of inadequately trained bars in our great cities—by the filling up of the profession with practitioners who can only conceive of law as a body of rules of thumb. In a time when the emphasis is upon change this unstable tendency is manifest under great diversity of conditions in different jurisdictions. The several states are in different degrees of transition from pioneer or rural agricultural conditions. In our great cities there is a large unsettled population, and the turnover of population everywhere is relatively large. Moreover, our polity requires standards of reasonableness to be enforced judicially upon legislation under the Fifth and Fourteenth Amendments. All this throws an exceptionally heavy burden on the American judiciary and makes us, for the time being, exaggerate the place of the judicial process in a general science of law.

In many ways the present state of the legal order throughout the world suggests the sixteenth and seventeenth centuries. There is the same groping for new ideas and ideals. There is the same failure of authority with nothing as yet discovered to take its place. There is the same resort to personal justice, administrative tribunals, and sometimes crude individualized methods. There is the same chafing, on the one

29. *MODERN THEORIES OF LAW* (1933) 16-17.

hand, at rule and form and, on the other hand, at a loose and unlimited judicial process.

As the strict law gave us rule and form as a means to certainty and uniformity in the granting and applying of legal remedies, as equity and natural law gave us the idea of making conduct certain by insistence on reason and good faith, the nineteenth century gave us the system of individual legal rights as a means toward security, an end toward which the other means had been reaching. Thus each stage in the development of the modern legal order has left some permanent contribution, to which we have added others without losing them. What the stage on which we seem to have entered will bring forth, it would be useless to conjecture. But we need not doubt that it will build on these achievements of the past.